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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LUIS A. HIGUIT,

Petitioner

v.

ALBERTO R. GONZALES,
United States Attorney General

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or not the Court of Appeals has jurisdiction over Petitioner's challenge to the denial of his adjustment of status under the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 because the determination that Petitioner is a persecutor or has engaged in persecutorial activities is a question of law or a legal claim that should have been addressed by the 4th Circuit Court of Appeals for purposes of exercising jurisdiction.

Whether or not Petitioner who is a military officer of the Philippine government and performs legitimate and regular military intelligence gathering duties and functions against terrorists who advocate the violent overthrow of the duly constituted government is a persecutor or is engaging in persecutorial activities under the purview of statutory and regulatory definition or as construed in accordance with judicial case law developed interpreting other persecution provisions contained in the INA, making him expressly ineligible for asylum or withholding of removal under 8 U.S.C.A. 1158(b)(2)(A)(i), 8 C.F.R. 1208.169(d)(2).

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Luis A. Higuit ("petitioner" hereafter) prays that this Court review on certiorari the judgment of the United States Court of Appeals, for the Fourth Circuit, which dismiss the appeal in part and affirm the judgment of the Board of Immigration Appeals in part.

DECISION BELOW

The published opinion dismissing the Petition for Review and the Petition for Rehearing by the United States Court of Appeals , Fourth Circuit is set out in the Appendix, at 1a-10a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit. , dismissed the Petition for Review in part and affirm the judgment of the Board of Immigration Appeals in part on January 3, 2006 and on February 28, 2006 denied rehearing. Appendix 8a. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S . Const. Amend. V

* * *

No person shall be deprived of life, liberty without due process of law.

STATUTE INVOLVED

Real ID Act of 2005, Pub. L. No. 109-13, Div.B
119 Stat. 231, 302-23
8 U.S.C. 1252(a)(2)(D)

Nothing in subparagraph (B)..... which eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of appeals in accordance with this section.

8 U.S.C.A. 1158(b)(2)(A)(i)

Asylum is unavailable where "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in particular social group, or political opinion.

STATEMENT OF THE CASE

Petitioner is a Philippine national who entered the United States under a nonimmigrant visa on May 16, 1990. He was a former officer of the Philippine Constabulary , a military branch originally set up and organized by the U.S government in 1902 when the Philippines was then considered as a semi-colony of the United States. The Philippine Constabulary is tasked of defending the duly constituted authorities against communists or terrorists poised to overthrow it by armed and violent means. Petitioner overstayed his visa and the Immigration and Naturalization Service (now the Department of Homeland Security) sought his removal. Higuit conceded removability and as a relief from removal applied for Political asylum and withholding of removal under the Convention Against Torture (CAT) based on a well-grounded fear of persecution on account of his work as intelligence operative.

In the individual hearing of October 15, 1999, the immigration judge (IJ) denied his principal relief for Asylum and withholding of removal under the Convention Against Torture (CAT) and granted him voluntary departure. The Immigration Judge found petitioner ineligible for asylum and withholding of removal under 8 U.S.C.A. 1158(b)(2)(A)(i): any alien who "ordered, incited, assisted , or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. The Immigration Judge solely

based his denial on the statement made by Petitioner in his own hand writing on the asylum application , Form I-589 in Question no.2, which he admitted that "because of his loyalty to the Marcos group and to the Military Establishment, I hurt so many people, ruin their career , some were imprisoned, and sometimes causes death to some others who are suspected to be leftist organization." On the same asylum application, Petitioner in his own handwriting likewise explained that: " I was a member of the Military (Philippine Constabulary) and I worked in the Intelligence unit. My job is to gather information of individual or organization of their activities, crime syndicates, anti-Marcos and groups who wants to overthrow the government thru infiltration and surveillance. We are allowed to work anywhere and any kind of job even outside the country, as long as we get in touch with our higher officers." Petitioner during his direct testimony and while in cross-examination in response to the said paragraph where Petitioner admitting "hurting so many people...", Higuit was never involve directly or indirectly in the infliction of physical harm . In fact , all this statements in the asylum application including his explanations of said main statement relied by the Immigration Judge as basis of his ineligibility is actually a rational and logical explanation of how he worked in the intelligence unit. Clearly, Petitioner was actually explaining and describing his main job of gathering information on individuals and organization by infiltration and surveillance. His work stops there. Petitioner later came to know how his so called intelligence reports and data gathering have been used by the military and the police in arresting suspected communists which led to their torture and sometimes summary execution. Petitioner who is engaged in legitimate combat activity is not a member of a group that persecutes. He is a military officer. Higuit was earmarked for liquidation and summary execution by the

New People's Army, a group designated by the U.S government as terrorist because his intelligence and surveillance reports which he submitted to his superiors were utilized to arrest suspected communists and terrorist during the Marcos dictatorship. There was no evidence or proof that Petitioner has been indicted or convicted of any human rights crime. Despite the absence of any evidence to support that Petitioner is a persecutor or is engaged in persecution, the Immigration Judge denied his political asylum and withholding of removal.

Petitioner appealed and sought review of the Immigration Judge's decision to the Board of Immigration Appeals. During the pendency of his appeal, the Board granted Petitioner's Motion for a remand to the Immigration Judge for consideration of his application for adjustment of status based on an approved labor certification and immigrant petition filed by his employer. The Immigration Judge in the remand hearing again denied Petitioner's application for adjustment of status to become permanent resident of the United States based on discretionary ground i.e since petitioner has been found ineligible for asylum because allegedly he has engaged in persecutorial activities as a military intelligence officer and is considered as an individual classified as a persecutor, his application to become permanent resident of the United States is being denied as a matter of discretion. Higuit submitted countervailing evidence that he was married, had a U.S Citizen child, owned substantial property in this country and was active in a church organization. Despite these positive factors, the Immigration Judge denied him the adjustment of status application because his good conduct did not outweigh his participation as alleged persecutor during the Marcos regime. Higuit brought his case once more to the Board of

Immigration Appeals and the Board without articulating the basis of their decision simply adopted and affirmed the Immigration Judge's decision denying the adjustment of status application.

A Petition for Review was filed on January 4, 2005 at the U.S. Court of Appeals Fourth Circuit. Petitioner and Respondent submitted their briefs for consideration. Subsequently with the REAL ID ACT in effect, Petitioner and Respondent were requested to submit supplemental briefings on whether or not the Court of Appeals has jurisdiction over Petitioner's challenge to the denial of adjustment of status under the Real ID Act of 2005. The case was orally argued before the United States Court of Appeals on December 1, 2005. The Court of Appeals in a published opinion dated January 3, 2006 dismissed the appeal relating to the IJ's denial of adjustment of status application of Petitioner as affirmed by the Board of Immigration Appeals, for lack of jurisdiction under the new REAL ID ACT. But reviewed the BIA's decision affirming the IJ's denial of asylum and withholding of removal. The Court of Appeals in the same legal framework that supports the basis for petitioner's denial of his adjustment of status application on discretionary ground i.e he being a persecutor or has assisted in the persecution of others likewise denied the asylum application and withholding of removal of Petitioner because he is found to have engaged in persecutorial activities making him ineligible as a qualified asylee or refugee in the United States.

On February 28, 2006, the U.S Court of Appeals denied Petitioner's petition for rehearing. Appendix 8a.

On this date of filing of this instant Petition for Writ of Certiorari. Petitioner was placed in DHS custody be virtue of his arrest by the ICE on April 20, 2006 and is presently detained at Howard County Jail Jessup.Maryland.

REASON FOR GRANTING THE WRIT

The U.S Court of Appeals Decision is in conflict with the Fifth Amendment of the U.S. Constitution and the legally pronounced expanded jurisdiction of the Court of Appeals under the Real I.D Act of 2005

The Real ID Act of 2005, (Act) Pub.L. 109-13, 119 Stat. 231 expanded the availability of Court of Appeals Review. Specifically, section 106(a)(1) of the REAL ID ACT amended INA 242 to include a new section INA 242(a)(2)(D) which states:

> (D) JUDICIAL REVIEW OF CERTAIN CLAIMS. - Nothing in subparagraph (B) or (C) , or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Petitioner's characterization on whether or not he is a persecutor involves a question of law and a legal claim for which the REAL ID Act allows the Court of Appeals to

review the denial of Higuit's adjustment of status application to become permanent resident of the United States. While it appears that his application for adjustment of status based on an approved I-140 Immigrant Worker Petition is being denied on discretionary ground, the reality is that his application is being denied solely upon the construction on whether or not Petitioner is a persecutor or has assisted in the persecution of others during the Marcos regime which is a bar in adjustment of status. The only evidence presented to support the claim that Higuit is a persecutor which makes him statutorily ineligible to adjust and become a permanent resident of the United States is his handwritten statement in his asylum application which he claimed he hurt so many people because in performing his regular and normal duties as an intelligence gatherer of the military, his information and data were wrongly utilized by the military and those in the barracks which led to the arrests , torture and even summary execution of terrorists and suspected communists during the Marcos regime. What does Petitioner got to do with the torturing soldiers and military scalawags who on their own volition and action failed to observe the minimum requirements of due process and observe fundamental basic human rights of those arrested as a result of the intelligence gathering made by Petitioner. The torture and excesses committed by the soldiers at the Abu Gharib Prisons were not the result of the intelligence and data gathered by U.S Military men leading to the arrests of these suspected terrorists who are in the Abu Gharib Prison . To hyper extend culpability and liability of physical torturers and those who engaged in atrocities to include even those who with patriotism engage in intelligence gathering of suspected terrorists not only cause great dishonor to these type of soldiers and their superiors who are doing their job under the constitution to protect the nation and our democracy, but